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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Colorado Supreme Court did not write an opinion. The opinion and order of the Water Court (App. 6-9) are not reported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 9, 1970 (App. 27). The petition

for a writ of certiorari was filed on October 7, 1970, and was granted on December 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether in 43 U.S.C. 666 Congress consented to suits against the United States in state courts for adjudication of its reserved water rights not predicated on state law.

2. Whether the congressional consent to suit in 43 U.S.C. 666 extends to monthly proceedings affecting federal water rights in which a water referee determines, without a formal hearing, water rights of those parties who have voluntarily filed water right applications during the preceding month.

STATUTES INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides in pertinent part:

> Suits for adjudication of water rights.
>
> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. * * *

The Colorado Water Rig
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et seq., provides in pertine

148-21-3. Definitio
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other legal entity, pu

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148-21-18. Applicat
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1969, Colo. Rev. Stat. 148-21-1
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unless the context clearly indi-
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y, public or private.

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pplications for water rights or
rights—plans for augmentation.
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appropriation, a determination
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to why the application should not
why it should be granted only in
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ust be filed by the last day of the
following the month in which the
filed. The fee for filing an appli-
twenty-five dollars; and for filing

a statement of opposition, the fee shall be fifteen dollars.

* * * *

(4) The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board, and other state agencies.

* * * *

148-21-22. Priorities junior to prior awards —when.—With respect to the divisions described in section 148-21-8, priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

STATEMENT

This case raises essentially the same issues involved in *United States* v. *The District Court in and for the County of Eagle and State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, but in the context of the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148-21-1 *et seq.*, which has superseded the statutory provisions underlying the *Eagle County* case.

On February 11, 1970, the Attorney General received notice, pursuant to Section 148-21-18 of the 1969 Act and directed to "All Persons Interested in Water Applications in Said Water Division No. 5," that "the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969" (App. 17). There followed a list of water right applications giving brief descriptions of the water use. The notice concluded with the statement that "[y]ou are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications" (App. 25). The Attorney General has received similar notices listing water right applications filed during each month thereafter and, in addition, similar resumes of applications filed in Colorado's Water Divisions 4 and 6 during the month of December 1969.

In response to the December 1969 notice, the United States filed with the Water Court of Water Division 5 a motion to quash service on the grounds, *inter alia*, that the proceedings before the water court do not constitute the type of water rights adjudication with respect to which the United States has consented to be sued under 43 U.S.C. 666. The water court denied the Government's motion (App. 9). It recognized that the consent issue is presently before this Court in *Eagle County*, *supra*, which arose from an earlier Colorado water rights proceeding involving a portion of the same water rights here involved. The court was of the view that it was bound by the decision of the Colorado Supreme Court in *Eagle County*

unless and until that decision was overturned by this Court (App. 9). Subsequently, the government's request to extend the time within which to file an answer pending the resolution of *Eagle County* was also denied. Finally, the government applied to the Colorado Supreme Court for a writ of prohibition to stay the proceedings for lack of jurisdiction, which the latter court denied without opinion on July 9, 1970 (App. 27).

In *Eagle County*, the United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37, one of the then 70 water districts in Colorado. Subsequent to the district court's denial of the government's motion to dismiss that action for lack of jurisdiction, the 1969 Act was passed abolishing[1] the 70 water districts and replacing them with seven water divisions. Water Division No. 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), and thus includes the former Water District 37 involved in the *Eagle County* case.

As in former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on

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[1] Section 148-21-44 of the 1969 Act provides that any pending proceedings under the old law not concluded by July 1, 1972, are to be transferred to the water judges for the divisions established by the new law. Additionally, any claimant in such pending proceedings may at any time withdraw and initiate new proceedings under the new law.

federal law, resulting principally from withdrawals of land from the public domain. Because of the size of new Water Division No. 5, however, the water rights of the United States involved in this case are more numerous than those involved in *Eagle County*.[2] The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior—through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife—uses water in Water Division No. 5 for recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves in the area which, when developed, would require water to accomplish the federal purpose for which the reservation was made.

SUMMARY OF ARGUMENT

We rely primarily on our brief submitted in *Eagle County, supra*, No. 87, this Term, and limit our discussion here to the significance of the changed Colorado water right adjudication procedures. In support of our argument that Congress did not consent to the adjudication of federal *reserved* water rights in state court proceedings, we point out that under the

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[2] The information in the remainder of this paragraph was furnished to us by the federal agencies involved, but is not reflected in the record at the present stage of the proceedings.

limited procedures of the 1969 Colorado Act, Colo. Rev. Stat. 148-21-1 *et seq.*, it is highly unlikely that the federal reserved rights will be recognized. Because Congress was undoubtedly aware of the fundamental inconsistency between reserved water rights existing under federal law and appropriative water rights—which the laws of the western states are designed to determine and protect—we submit that Congress plainly did not intend through the enactment of 43 U.S.C. 666 to jeopardize federal reserved rights by subjecting them to state adjudications, but intended merely to submit federal claims arising under state law to state procedures.

In Part II, we show that the monthly proceedings of limited scope authorized by the 1969 Colorado statute do not constitute the type of general adjudication to which the United States may be made a party under the federal consent statute.

ARGUMENT

I

Congress Did Not In 43 U.S.C. 666 Consent To The Joinder Of The United States For The Adjudication Of Its Reserved Water Rights In State Court Proceedings

The basic arguments supporting our position that Congress did not in 43 U.S.C. 666 consent to state court adjudications of the reserved water rights of the United States are set forth at length in our *Eagle County* brief at pages 10-19. Those arguments are equally applicable here and will be stated only to the extent necessary to show that, in our view, the 1969

Colorado Act reinforces the conclusions reached in that brief.

In *Eagle County* (Br. 10-11), we started with the premise that the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the land was withdrawn, subject only to water rights vested in others as of the date of withdrawal. After setting forth our interpretation of 43 U.S.C. 666 and its legislative history, we noted (Br. 16-17) that the concept of reserved water rights is fundamentally inconsistent with the appropriation system of water law prevalent in Colorado and other western states and that a construction of the consent statute which would subject federal reserved rights to state court proceedings would open the way for an attempt to adjudicate reserved rights out of existence.

In pursuit of this point, we had noted before the Colorado Supreme Court in *Eagle County* that reserved rights not only would not, but could not, be recognized in district court supplemental water adjudications, because the then applicable state statutes and decisional law precluded the granting of priority dates in such adjudications earlier than the date of the last prior water adjudication. The Colorado Supreme Court rejected this argument (*Eagle County* App. 40), ruling that under the general jurisdictional provisions of the Colorado Constitution, the state district court would have jurisdiction to consider reserved water right claims of the United States dating back to the withdrawal of the federal lands

in question. While we still question whether the district court in *Eagle County would* recognize such rights, we point out that the 1969 Act provides for a much narrower type of water adjudication proceeding and makes it highly unlikely that reserved water rights will be considered.

Section 148-21-22 of the 1969 Act provides:

> Priorities junior to prior awards—when.—With respect to the divisions described in section 148-21-8, priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

This provision would appear to foreclose as to all unadjudicated federal reserved—as well as appropriative—water rights, the recognition of pre-1969 priority dates. There thus appears to be no means under the 1969 Colorado statute for perfecting federal reserved water rights. This re-emphasizes our submission that an interpretation of 43 U.S.C. 666 as embodying consent to reserved water right adjudication might effectively eliminate federal reserved rights and drastically affect the management of federal lands in Colorado and other western states.[3]

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[3] To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division No. 5 relate to Indian lands. In the event this Court should rule that 43 U.S.C. 666 subjects federal reserved rights in general to state adjudication, there would remain the fur-

II

The Monthly Proceedings Authorized By The Colorado Water Right Determination And Administration Act Of 1969 Are Not Suits To Which The United States Has Consented To Be Joined Under 43 U.S.C. 666 Regardless Of The Nature Of The Rights Claimed By The United States

Again, we rely primarily on our *Eagle County* brief, in which we argued at pages 24-30 that the Colorado procedures there at issue did not provide for the type of adjudication proceedings covered by 43 U.S.C. 666. In our view, however, the new state procedures authorized by the 1969 Act to determine and administer water rights are even more clearly not within the scope of the federal consent statute than the procedures they supersede.[4]

The federal courts which have construed 43 U.S.C. 666 have concluded that Congress intended to waive the sovereign immunity of the United States only in general water right adjudications. See *Dugan* v. *Rank*, 372 U.S. 609, 618-619; *Miller* v. *Jennings*, 243 F.2d 157, 159 (C.A. 5), certiorari denied, 355 U.S. 827; *Eagle County* Br. 25-27. The essential elements of the proceedings to which the United States has

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ther question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public.

[4] One defect of the old procedures has been mitigated, however, since each of the seven new divisions is obviously more likely to encompass a stream system within the meaning of 43 U.S.C. 666 than were any of the 70 districts under the old law.

consented to be joined as a defendant, as described in these decisions as well as in the legislative history of the federal statute (see our Brief in No. 87, pp. 12-15), are that all the water users and all the water rights on a stream must be joined in the action before the court and all the rights of the parties be determined as between themselves. These elements constitute the essence of a "general adjudication."

The proceedings under the 1969 Act do not approach such a general adjudication. The only water rights involved in the monthly proceedings before the water referee are those for which an application was made during the preceding month and which are listed on the resume prepared by the water clerk. Section 148-21-18. The Act does not require that all or any particular number of claimants to water from a particular or common source be joined, nor does it provide for a determination *inter sese* of such claims. Neither the statute nor the notice thereunder demands or requires that the United States or any other water user in a division file an application or claim in order that it can be determined along with all others or even those included in the notice. Instead, the statute provides only that (Colo. Rev. Stat. 148-21-18(1)):

> Any person who wishes to oppose the application may file with the water clerk in duplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions.

The result of the application and permitted response is that a water referee will consider the particular

month's applications and any statements in opposition filed and, without holding a formal hearing, make his ruling.[5]

In the instant case, the notice of applications filed during the month of December 1969 in Water Division 5 and mailed to the Attorney General contained 17 applications (App. 17-25). These 17 applications and any oppositions filed thereto delimit the subject matter of the proceedings before the referee pursuant to this notice. The proceeding is thus limited to a mere fraction of the rights and claimants to water from sources within the area of Water Division 5. Were the United States to respond to the December notice and file a statement in opposition, the result would not be a decree finally determining all of the rights to use water in the division among all claimants, but a ruling pertaining only to those 17 applications filed. As noted above (*supra*, p. 12), in response to this notice the United States is neither asked nor permitted to submit its claims. For the claims of the United States to be the subject of a decree, the United States must affirmatively initiate a proceeding by filing an application for a water right under Section 148-21-18.

Respondents may assert that there are compelling reasons why the United States should, as a matter of policy, voluntarily submit its claims to state courts

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[5] Under Section 148-21-19(2), the referee has the option of referring the matter to the water judge without making a ruling.

for determination.[6] That question, however, is not before the Court since 43 U.S.C. 666 is clearly not a statute directing the Department of Justice to initiate proceedings on behalf of the United States, but simply permits joinder of the United States as a defendant in proper suits. We submit that the limited monthly adjudication proceedings established by the 1969 Act are not the type of suits covered by the federal consent statute.

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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Attorneys.

JANUARY 1971.

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[6] See the brief of the State of Wyoming as *amicus curiae* filed in Eagle County, No. 87, this Term. The *amicus* briefs of other states make similar suggestions.

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